SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Appellants reply to the State of Florida as follows:

1. The State's argument that it had no "intention" that the restaurant segregate ignores the obvious fact that

the very consequence of its activities—that of its police, its courts, and its prosecuting attorneys—was the enforcement of racial segregation. Further, the intentions and motives of the State authorities were wholly irrelevant in *Shelley* v. *Kraemer*, 334 U.S. 1; 92 L.Ed. 1161; 68 S. Ct. 836 (1948); and *Barrows* v. *Jackson*, 346 U.S. 249; 97 L.Ed. 1586; 73 S. Ct. 1031 (1953). And as the Court said in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725; 6 L.Ed. 2d 45, 52; 81 S. Ct. 856 (1961):

> " . . . no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

Moreover, any suggestion that the State acted simply as a "neutral" in these proceedings was completely negatived by the statement of the prosecuting attorney at the trial, who, objecting to a question as to whether Mr. McKelvey, Shell City's vice-president, had been asked to drop the charges, categorically asserted:

> "I am going to object to the second part. The State of Florida brought the action and not the witness. *He would not be in any position to drop the action.*" (R. 24) (Emphasis supplied)

2. The suggestion that the restaurateur would have a right of "self help" begs the question. While he may use reasonable force to evict a trespasser (6 Am. Jur. 20, Assault and Battery §§ 167, 168), nevertheless, such action assumes that the party evicted is unlawfully on the prop-

erty. However, the very issue here is whether, under the rule announced in *Shelley* and *Barrows*, Appellants were indeed unlawfully on the property. If they were not, then the use of "self help" by the restaurateur would subject him to liability for assault and battery, and this asserted right is thus rendered illusory. Further, if by virtue of *Burton v. Wilmington Parking Authority*, *supra*, *Public Utilities Commission* v. *Pollack*, 343 U.S. 451; 97 L.Ed. 1068; 72 S. Ct. 813 (1952); *Marsh* v. *Alabama*, 326 U.S. 501; 90 L.Ed. 265; 66 S. Ct. 265 (1946); and the other authorities cited in Part II of Appellants' Main Brief, the restaurant had the affirmative constitutional obligation to *serve* Appellants, then any notion of a right to "self help" would thereby evaporate.

3. The State's prediction of an "explosive situation" is the typical segregationist response in almost every civil rights case, and is an argument the Court rejected long ago in *Buchanan* v. *Warley*, 245 U.S. 60, 81; 62 L.Ed. 149, 163; 38 S. Ct. 16 (1918); rejected again, and in the face of the truly explosive situation in Little Rock, in the case of *Cooper* v. *Aaron*, 358 U.S. 1; 3 L.Ed. 2d 5; 78 S. Ct. 1401 (1958); and rejected again only last term in *Edwards* v. *South Carolina*, 372 U.S. 229; 31 Law Week 4225 (1963). Moreover, in the case at bar, there is no evidence whatsoever in the record of any violence or any attempted violence.

4. In Part II of their Main Brief Appellants set forth that they were not urging, and demonstrated that there are no compelling reasons to conclude, that the rule in *Shelley* and *Barrows* be extended to protect intrusions into a truly private situation, such as one's home, and the same reasoning applies to the argument set forth in Part

II of the Main Brief with respect to the effect of state licensing laws. Consequently, Appellee's references to car-pools and to the multitude of laws governing the homestead pose no obstacle to constitutional adjudication in favor of equal protection where the discrimination is practiced in places of truly public accommodation and which significantly affect patterns of community relations.

The State's appeal to "logic", therefore, is an appeal to a false logic, since it assumes a premise not suggested by Appellants. In *Burton* v. *Wilmington Parking Authority, supra*, the Court laid at rest any notion that the requirement of state action is necessarily predicated upon a rigid conceptualism. As the Court said:

> "Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause in an impossible task which this Court has never attempted. [Citation]. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." 365 U.S. 715, 722; 6 L.Ed. 2d 45, 50.

Compare in this regard Holmes, J. in *Hudson County Water Company* v. *McCarter*, 209 U.S. 349, 355; 52 L.Ed. 828, 832; 28 S. Ct. 529 (1908):

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side."

5. The State misreads *Valle* v. *Stengle*, 176 F. 2d 697 (3rd Cir., 1949), for the Court of Appeals decided the case on alternative grounds, concluding as it did that the complaint stated a cause of action under both Federal and State laws. Further, Appellants cite *Valle* simply for the proposition that the state may not interfere with the right to *solicit* a contract where such interference would effectuate private racial discrimination.

6. Appellee's argument that judicial condemnation of racial discrimination cannot affect traditional community attitudes, ignores the events of contemporary history. As a result of *Shelley* and *Barrows*, Negroes now live in neighborhoods where they were formerly regarded as pariahs. As a result of *Morgan* v. *Virginia*, 328 U.S. 373; 90 L.Ed. 1317; 55 S. Ct. 1050 (1946), *Henderson* v. *United States*, 339 U.S. 816; 94 L.Ed. 1302; 70 S. Ct. 843 (1950) and similar cases, racial segregation in public

transportation has practically disappeared. As a result of *Brown* v. *Board of Education*, 347 U.S. 483; 98 L.Ed. 873; 74 S. Ct. 686 (1954) and succeeding cases, hundreds of school districts throughout the South have desegregated or have begun to desegregate. And, following *Garner* v. *Louisiana*, 368 U.S. 157; 7 L.Ed. 2d 207; 82 S. Ct. 248 (1961) and companion cases, and *Peterson* v. *City of Greenville*, 373 U.S. 244; 31 Law Week 4475 (1963), and companion cases, restaurants, hotels and theaters, in hundreds of cities throughout the South now admit Negroes for the first time in history. The moral imperative of the Equal Protection Clause is, therefore, no mere fiction, and its salutary effects have been abundantly demonstrated.

7. Appellee's citations are, in the main, irrelevant, viz.:

(a) *Alpaugh* v. *Wolverton*, 36 S.E. 2d 906, did not deal with the issue of race.

(b) *Coleman* v. *Middlestaff*, 305 P. 2d 1020, held only that a dentist was not covered by California's public accommodation law.

(c) *Garfine* v. *Monmouth Park Jockey Club*, 148 A. 2d 1, stated specifically that the exclusion from the racetrack was not made on the basis of color.

(d) *Fletcher* v. *Coney Island*, 136 N.E. 2d 344, held simply that the Ohio Civil Rights Act, which created criminal penalties for racial discriminations, created no new equitable remedies.

(e) *Goff* v. *Savage*, 210 P. 374, dealt only with the question of whether racial discrimination by a drug store owner at his soda fountain constituted violation of a state statute, i.e., whether it was a place of public accommodation within the meaning of that statute.

(f) *Good Citizens Association* v. *Board*, 217 Md. 129, merely involved the propriety of action by the Board of Liquor Licenses Commissioners in granting a transfer of a liquor license to a new location.

(g) *Greenfield* v. *Maryland Jockey Club*, 190 Md. 96, did not involve racial discrimination.

(h) *Horn* v. *Illinois Central Railroad*, 64 N.E. 2d 574, again involved only a question of state law.

(i) *Madden* v. *Queens County Jockey Club*, 72 N.E. 2d 697, did not involve racial discrimination, and the court specifically stated that exclusion from the race-track could not be founded upon race or color.

(j) *Terminal Taxicab Company* v. *Kutz*, 241 U.S. 252; 60 L.Ed. 984; 36 S. Ct. 583, was concerned only with the jurisdiction of the Public Utilities Commission of the District of Columbia to fix rates for certain taxicabs.

The cases of *De La Ysla* v. *Publix Theaters Corp.*, 26 P. 2d 818; *Terrell Wells Swimming Pools* v. *Rodriguez*, 182 S.W. 2d 824; and *Younger* v. *Judah*, 19 S.W. 1109, all antedate *Shelley* and *Barrows* and other more recent pronouncements of the Court in the field of race relations. *Younger* v. *Judah*, *supra*, is in part, however, relevant to Appellants' argument in Part III of their Main Brief, for the court stated, with respect to the segregated facilities provided by the theatre owner, that:

"this rule adopted by him accords with the custom and usage prevailing in the state. *Such custom has the force and effect of law* until some competent legislative power shall establish some other and different rule." (Emphasis supplied) 19 S.W. 1109, 1111.

State v. *Clyburn*, 101 S.E. 2d 295; *Drews* v. *State*, 224 Md. 186; *Slack* v. *Atlantic White Tower System, Inc.*, 284 F. 2d 746 (4th Cir., 1960); *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir., 1959) and *Griffin* v. *Collins*, 187 F. Supp. 149 (D.C. Md., 1960), appear to agree in some measure with Appellee's position, but, not surprisingly, all expressed the response of jurisdictions located in the South. Appellants submit that, based upon their arguments herein and in their Main Brief, these cases were erroneously decided, and urge the Court to discredit them by its decision in the case at bar.

CONCLUSION

For the foregoing reasons Appellants reiterate the prayer for relief contained in their Main Brief.

Respectfully submitted,

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By _____
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CERTIFICATE OF MAILING

I, ALFRED I. HOPKINS, counsel for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on October_____, 1963, I served copies of the foregoing Appellants' Reply Brief on the Appellee, STATE OF FLORIDA, by mailing copies thereof to the office of RICHARD E. GERSTEIN, State Attorney, Dade County Courthouse, Miami, Florida; to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida; and to RALPH S. SPRITZER, Esq., Assistant to the Solicitor General of the United States, Department of Justice, Washington, D. C.

_____

Alfred I. Hopkins